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2 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
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7 FIRST APPELLATE DISTRICT, DIVISION FIVE
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JOE REQUA, WENDELL G. MOEN, JAY DAVIS AND DONNA VENTURA,

Petitioners and Appellants,

v.

REGENTS OF UNIVERSITY OF CALIFORNIA, *et al*.,

Respondents and Respondents.

No. A132778

Alameda County Superior Court No. RG 10530492

APPELLANTS' OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA
Hon. Frank Roesch

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INTRODUCTION

Appellants ("Livermore Retirees" or "Retirees") are former employees of Respondent University of California ("UC" or "Regents"). They spent their careers working at Lawrence Livermore National Laboratory ("Livermore" or "Lab"), working under the same terms and conditions and receiving the same benefits as other UC employees. Each of the Appellants worked decades at Livermore. And each of them retired from the Lab at some point between 1999 and 2006. In fact, for years after they retired, UC continued to provide them with the same pensions and UC-sponsored retiree health care from the UC Retirement Plans ("UCRP") that it provided to other UC retirees.

UC operated Livermore Lab from 1952 until 2007, a period of more than fifty years. In 2007, a public-private consortium known as Lawrence Livermore National Security ("the Consortium"), of which UC is a member, began operating the Lab. On January 1, 2008, UC terminated coverage of the Livermore Retirees' under the UC-sponsored health plan and removed them from the UC risk pool comprised of active and retired UC employees. Since then, the Consortium has purchased retiree health coverage outside of the UCRP. These benefits are inferior to and more costly than the UC-sponsored health benefits that UC continues to provide other UC retirees. Their removal from the UC-wide risk pool has left them in a smaller, older and more infirm risk pool made up of rapidly aging Livermore retirees. This change virtually guarantees that the costs of their coverage will continue to rise more rapidly had UC not terminated coverage. The Consortium also asserts a right to alter or even terminate retiree health care altogether.

In their First Amended Petition, the Livermore Retirees alleged that their rights to UC-sponsored retiree health care were earned and vested long before they retired, and that UC was obligated to continue their coverage under the UC-sponsored plan. The Livermore Retirees never worked for the Consortium and had no prior relationship with them. The Retirees never consented to termination of their UC-sponsored health coverage and they never agreed that after 2007, the Consortium would provide their health coverage under whatever terms it saw fit.

The Livermore Retirees brought suit to vindicate their right to receive UC-sponsored health coverage under the same terms as other UC retirees. The court below sustained UC's demurrer, finding that the Retirees failed to a state a claim. Among other things, the lower court held that California law did not recognize implied contracts in public employment. Thereafter, the California Supreme Court held otherwise in *Retired Employees Assn of Orange Count*y, 52 Cal.4th 1171 (2011) ("*Orange County*"), where it ruled that an implied contract can arise between public employees and a public employer.

In adjudicating a demurrer, the court must take all well-pleaded facts as true. The allegations of the First Amended Petition are more than sufficient under California law to state claims for breach of an implied and/or express contract and/or under promissory and equitable estoppel.

Contracts in public employment may be express or implied. Implied contracts do not require an express promise or any magic words. *Orange County* held unequivocally that public employees can establish a right to receive retiree health based on an implied contract. In this connection, a contract may be implied from facts, circumstances,

statements and conduct, using traditional principles of contract construction. As we explain, Appellants have pleaded all of the facts and elements needed to establish cognizable claims of either an express or an implied contract.

The same is true for Appellants estoppel claims. Speaking broadly, these claims require proof that UC made a promise or representation upon which the Retirees relied to their detriment that UC should not be permitted to disavow in light of the attendant circumstances. Appellants have alleged the facts and elements required to state legally cognizable claims of both promissory and equitable estoppel. Accordingly, this Court should deny the Regents' demurrer and permit the Retirees to proceed with their case.

FACTS

The Livermore Lab opened in 1952 as a branch of the UC Radiation Laboratory. From 1952 until 2007, the Regents operated Livermore under a contract with the U.S. Department of Energy ("DOE"). Joint Appendix ("J.A.") 114 [First Amended Petition ("FAP") ¶ 28, p.7].

Each of the four Appellants spent his or her career at Livermore. Other than a brief break in service in 1964-1965, Appellant Joe Requa worked at the Lab from1961 (while he was still in graduate school) until he retired in October 1999, a span of nearly forty years. After he retired in 1999, UC treated Requa like other UC retirees and provided him with UC-sponsored health care for the next ten years. In 2008, however, the Regents terminated Requa's UC-sponsored retiree health care. Since then, the Consortium has providing health care for Requa and other Livermore Retirees by purchasing coverage outside of the UCRP. These benefits are inferior to and more costly

than the UC-sponsored benefits that UC provides to its other retirees. The other Appellants also their UC-sponsored health benefits in like fashion. This includes Wendell Moen, who worked at Livermore from the early 1960s until he retired in 2000; and Jay Davis and Donna Ventura, who were hired in 1971 and 1974, and retired in 2002 and 2006, respectively.[1]

Respondents acknowledge that the Livermore Retirees were UC employees. As such, they were subject to the same policies as other UC employees and they were entitled to the same benefits. J.A. 114 [FAP ¶¶ 29-30, p.7].

On October 23, 1961, the Regents, acting "in accordance with policies and procedures used by the Regents in the ordinary course of their business and in the proper exercise of their powers," adopted a resolution that authorized medical benefits for UC employees and retirees. J.A. 115 [FAP ¶ 32, p.8]; and *see* J.A. 406, 435 [Sinclair Declaration, Petitioners' Request for Judicial Notice, filed 4/4/11, ¶ 9, Exh. G]. The resolution has **no** reservation of a right to alter or eliminate these benefits later. J.A. 115-116, 435 [FAP ¶ 36].

There was no (nor is there any) California law or UC policy that prohibited or restricted the Regents from authorizing medical benefits for employees and retirees. To the contrary, governmental policy generally favors the provision of medical benefits to them. J.A. 115 [FAP ¶34]. Further, UC has acknowledged that retiree benefits are an integral part of employee compensation and an important recruiting and retention tool. J.A. 121-122 [FAP ¶¶ 60-61; Exh. 10, pp. 6, 9]. Indeed, the Livermore Retirees remained

[1] See J.A. 111-113 [FAP ¶¶ 6, 7, 9, 13 and 19].

at the Lab until they retired in significant part, because they reasonably expected to receive UC-sponsored health benefits in retirement. J.A. 110-113; 121-122 [FAP ¶¶ 6-7, 9, 13, 19, 58-59, 63].

In fact, from 1961 through 2007, the Regents provided medical benefits to UC employees and retirees, including those from Livermore, without interruption. In January 2008, the Regents terminated UC-sponsored coverage for Livermore retirees. Since then, the Consortium has provided them with less comprehensive and more expensive coverage. J.A. 115; 123 [FAP ¶¶ 33, 66-67].

After the Regents authorized medical benefits in 1961, UC began telling employees they would receive health care while working and during retirement. J.A. 115 [FAP ¶ 32]. In the years that followed, UC reaffirmed this commitment in various benefit books distributed to employees. In 1979, for example, a UC benefits book advised employees that upon retirement,

> You may continue your University-sponsored group health plan coverage for you and your eligible dependents after you retire. In most cases, the premiums will be the same as when you were employed, and you will continue to receive The Regents' health plan contribution. The balance of the premium will be deducted from your monthly Retirement Income.

J.A. 116 [FAP ¶ 39, Exhs. 1-2]. These benefits were offered without qualification or asserted reservation of rights to alter or terminate it.

In 1980, UC distributed a "Benefits Information Packet" that provides that medical coverage "can be continued as long as monthly income received from retirement system is large enough to cover employee contribution." It assured them that: "Employer contribution continues during retirement." J.A. 117 [FAP ¶ 43, Exh. 3].

A 1984 booklet entitled "Your Retirement Plan Coordinated with Social Security" issued by the University of California Retirement System.[2] It provides that coverage under the UC plan will continue, as will UC contributions towards healthcare so long as the eligibility standard is met,[3]

> UC-sponsored health and dental plan coverage can be continued for yourself and enrolled family members when UCRS monthly benefits are paid. The University's monthly contribution for your plan premiums also continues, in the same amount as for active employees, if the conditions are met.

J.A. 117 [FAP ¶ 44, Exh. 4]. A booklet for "Members not covered by Social Security" contained similar language. J.A. 161 [FAP, Exh. 5].

A 1988 publication entitled *Benefits* (published by the Lab)[4] in the section entitled "Your Benefits - The Other Part of Your Compensation," provides: "Up to date, quality benefit plans make up *a large part of your compensation*" and "are *like your other paycheck.*" It further provided: "Benefits are like your other paycheck - because the Laboratory pays all or most of the costs for many. And that amount is over and above

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[2] The University of California Retirement System ("UCRS") is now known as the University of California Retirement Plan ("UCRP").

[3] The only specified condition of eligibility was that "UCRS benefits must start within four months after your employment ends." J.A. 166 [FAP, Exh. 6, p. 4].

[4] Although *Benefits* was issued by Lab, it states clearly that the benefit plans referred to are the UC plans: "The benefit plans discussed in this booklet are governed entirely by the terms of retirement plan provisions, University of California Group Insurance Regulations and group health/insurance plan contracts, and applicable state and federal law. Those terms apply if information in the booklet is not the same. The Laboratory Benefits Office can give you the name of the person to contact to review any UC provision or contracts." J.A. 118 [FAP ¶ 46, Exh. 6].

your salary." Indeed, "The Laboratory's benefits program is designed to help protect you and your family against events that can interrupt income or drain finances today. And they help you to *prepare for tomorrow's financial security*." J.A. 118 [FAP ¶ 46, Exh. 6] (emp. added). Lab employees were told, "When you retire you can keep your health, dental and legal plan coverages; the Laboratory's contributions to the health and dental plans continue, provided you retire within four months of separating from the Laboratory." J.A. 118 [FAP ¶ 46, Exh. 6].[5]

In 1990, Livermore's Benefits Office distributed *The Retiree Handbook*. Under "Medical and Dental," it provides: "Whether a member of PERS or UCRP your University group medical and dental plans may be continued when you retire, *provided that you are enrolled at the time of retirement.*" J.A. 119 [FAP ¶ 50, Exh. 7] (emp. in original).

In 1998, the Regents distributed the *University of California Retirement Handbook*. The section entitled "Eligibility to Continue Medical and Dental Coverage" reads: "If you elect UCRP monthly retirement income, you may be eligible to continue your UC medical and/or dental coverage if:" you enrolled in UCRP plan at retirement;

[5] The *Benefits* book provides reads: "This booklet provides an introduction to Laboratory benefits. It gives a general overview of your personal and family benefit plans. You shouldn't consider it a promise or guarantee of plan coverage or benefits. You have to meet eligibility rules for coverage and qualification rules to receive benefits." J.A. 165 [FAP, Exh. 6, p.1]. The Regents characterized this as a reservation of rights, but it is not. The last two sentences, read together, say no more than that retirees must "meet eligibility rules" to receive coverage. ("You shouldn't consider this a promise or guarantee"…. because "[y]ou have to meet eligibility rules…to receive benefits.") Of course, in a demurrer, the Retirees are entitled to the benefit of all favorable inferences and the evidence must be read in the light most favorable to them.

maintained coverage until retiree health benefits started; elected monthly pension payments and began receiving these within 120 days of retirement; and met specified age and service levels. J.A. 120 [FAP ¶ 54, Exh. 8]. Employees hired before January 1, 1990 "will receive 100% of UC's maximum contribution." *Id.* All Appellants met this criteria.

Elsewhere on the page appeared this:

> Health and welfare benefits are not accrued or vested benefit entitlements. UC's contribution toward the monthly cost of the coverage is determined by UC and may change or stop altogether, subject to the state of California's annual budget appropriation.

J.A. 119-120 [FAP ¶ 54, Exh. 8, p. 14]. It is worth noting while UC's contribution is "subject to" the state budget appropriation, UC has provided continuous coverage to retirees since 1961.[6]

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[6] The 1998 *Handbook* is the earliest writing identified where UC claims retiree benefits "are not accrued or vested" and that it can alter the amount of its healthcare contribution "subject to" the state budget. On the inside back cover, in tiny, 8-point print, is this:

> [UC] intends to continue the benefits described here indefinitely; however, the benefits of all employees, annuitants, and plan beneficiaries are subject to change or termination at the time of contract renewal or at any other time by [UC] or other governing authorities. [UC] also reserves the right to determine new premiums and employer contributions at any time. Health and welfare benefits are subject to legislative appropriation and are not accrued or vested benefit entitlements...

J.A. 120 [FAP ¶56, Exh. 8]. Plainly, this cannot mean what it says. If "benefits of … annuitants and plan beneficiaries are subject to change or termination … at any other time," UC could alter or terminate *pension* benefits at will. Further, the Regents acknowledge that 'lifetime retirement income' *is* 'vested' 'for life.'" J.A. 206 [Regents' Brief in support of Demurrer to FAP, p. 11; Regents' Request for Judicial Notice, Exh. H, at pp. 2, 5, 8]. Thus, any reliance on this language is misplaced. [con't]

The 2000 *Election Handbook, under* "UC-sponsored Health and Welfare Coverage," reads that, "if you are eligible to continue coverage and you elect monthly retirement income, you may continue the same coverage." J.A. 121 [FAP ¶ 57, Exh. 9]. It also states,

> UC reserves the right to determine new premiums and employer contributions at any time. Health and welfare benefits are subject to legislative appropriation and are not accrued or vested benefit entitlements.

J.A. 121 [FAP ¶ 57, Exh. 9]. This language is, more or less, the same as the 1998 provision discussed earlier. UC declares that retiree health and other welfare benefits are "not accrued or vested," and it asserts a right determine new premiums and the amount of its contribution to retiree health, which, as always "are subject to" the state budget. *Id.* Once again, it claims no right to terminate retiree health coverage under UC-sponsored

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Similar language was construed in *Creighton v. Regents of University of California,* 58 Cal.App.4th 237, 68 Cal.Rptr.2d 125 (1997), a case involving a UC early retirement incentive. According to plan language, the benefits offered ("crediting of additional age and Service Credit…and/or payments") "shall not be a vested or accrued Plan benefit." *Id.* at 244. Plaintiffs argued that this meant that employees might retire early but UC would be free to take back the incentive benefits. "The Regents replied that, once an employee retires and starts receiving payment in conformance with the terms of [the Plan], 'we would concede this is a vested benefit.'"

Creighton teaches that UC's assertion that benefits "are not accrued or vested" does not mean that these cannot vest at retirement. *Creighton* noted that early retirement was consideration for the incentive plan benefits. It contrasted this to pension benefits, which it described as "compensation 'withheld to induce long-continued and faithful service" [citing, *Kern*, *supra*, 29 Cal.2d at p. 852], and "which immediately vests by implication as in the *Kern-Betts* line of cases." 58 Cal.App.4th at 245. *Thorning v Hollister School District*, 11 Cal.App.4th 1598 (1992), held that this is also true for retiree health benefits.

plans.[7]

Appellants retired between 1999 and 2006, after providing UC with decades of faithful service at Livermore and having remained there in large part, "because they would receive University-sponsored group health plan coverage when they retired." J.A. 110-113; 121-122 [FAP ¶¶ 6-7, 9, 13, 19, 58-59, 63]. As noted, the Regents did, in fact, provide them with the promised medical benefits from retirement until 2008. J.A. 110-113 [FAP ¶¶ 8, 11, 15-17, 21-23]. Appellants Requa and Moen, for example, received UC-sponsored benefits for 10 and 9 years respectively after retirement until UC terminated coverage in 2008. Since then, the Consortium, an entity the Retirees had no prior relationship with, has provided inferior and more expensive health benefits from outside the UCRP. J.A. 110-113; 123, 126 [FAP ¶¶ 8, 11, 16-17, 21-23, 67, 91-92]. Also, the removal of the Retirees from a UC-wide risk pool comprised of active and retired employees and segregating them in a smaller, older and more infirm group, virtually guarantees a rapid rise in the costs of their health care. *See* J.A. 110-113; 126, 132 [FAP, ¶¶ 8, 11, 16, 21, 93, 94].

RULINGS BY TRIAL COURT

On December 21, 2010, the trial court sustained the Regents' demurrer with leave to amend, finding that, "Petitioners have not set forth facts sufficient to identify the contract which serves as the basis for their claim of constitutional impairment of

[7] A statement like the one discussed in n.5 appears in 8-point type. J.A. 174 [FAP, Ex. 8].

contract."[8] J.A. 217 [Order Sustaining First Demurrer, p. 1]. The Livermore Retirees filed an Amended Petition on January 24, 2011, and attached as exhibits excerpts from nine UC benefit books distributed in 1979, 1980, 1984, 1988, 1990 and 2000, each of which assured employees they would continue to receive "University sponsored group health plan coverage... after you retire." J.A. 116-117; 119 [FAP ¶¶ 39, 42, 51].

The Amended Petition contains five counts: (1) impairment of implied contract; (2) impairment of express contract; (3) promissory estoppel; (4) equitable estoppel; and (5) declaratory relief. J.A. 124-132 [FAP ¶¶ 75-135]. The Retirees added new allegations and, as noted, excerpts from benefit handbooks UC distributed to employees from 1979-2000. J.A. 139 [FAP, Exhibit Index]. Retirees maintain that these documents confirm that the Regents promised UC-sponsored health care during retirement—provided they met the eligibility conditions (which Appellants satisfied). J.A. 119-120 [FAP ¶¶ 54, 55].

The court below described the Retirees' case this way: "Respondent made various statements and representations beginning in the 1960s and continuing through 2007 which, coupled with Petitioners' continuing employment, constituted a binding contract between Petitioners and Respondent to provide Lab retirees with lifetime retirement medical benefits equal to those provided to other University retirees." J.A. 542 [Order Sustaining Demurrer, p.3]. The court also reviewed the handbook excerpts. J.A. 140-

[8] The lower court found that the Petitioners' allegations at ¶¶ 31-34 of the original Petition, were "insufficient to establish the existence of any contract, written or oral, to provide in perpetuity medical benefits to [Lab] retirees which are the same as medical enefits offered to other [UC] retirees." J.A. 217 [Order Sustaining First Demurrer, p. 1].

178 [FAP, Exhs. 1-9].

On May 26, 2011, the court sustained the Regents' demurrer to the First Amended Petition without leave to amend. J.A. 540-550 [Order Sustaining Demurrer, pp.1-10]. It court cited three reasons for dismissing the contract counts. First, Petitioners identified "no minutes, resolution, or formal standing order" from the Regents authorizing retiree health benefits. *Id.* at 5. Second, the UC handbooks did not support "express contractual promises" and were "replete with permissive language favoring Respondent" and "clearly stat[ed] that retiree medical benefits were not vested and could be modified or eliminated at any time." *Id.* at 4. Third, California did not recognize implied contracts involving public employees:

> Absent a clear promise and supporting legislative or statutory authorization creating an express contract, or authority supporting that an implied contract can exist under the circumstances of this case (where retiree medical benefits are claimed as vested rights), Petitioners' first and second causes of action fail.

Id. at 6-7.

The court sustained the demurrer to the estoppel counts using much the same reasoning. In its view, UC never made a clear and unambiguous promise of retiree health care throughout retirement and thus there was no misrepresentation or promise that it should be estopped from denying. J.A. 548 [Order Sustaining Demurrer, p. 9].

ARGUMENT

I. Standard of Review

"[O]n appeal from a judgment entered on demurrer, the allegations of the complaint must be liberally construed with a view to attaining substantial justice among

the parties." *Youngman v. Nevada Irr. Dist.,* 70 Cal.2d 240, 244-45, 449 P.2d 462 (1969) (*citing* Code Civ. Proc. § 452). "[A] plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action." *Id.* (*citing Smith v. Kern County Land Co.*, 51 Cal.2d 205, 206, 209 (1958)). A reviewing court must examine the complaint "*de novo* to determine whether it alleges facts sufficient to state a cause of action under any legal theory" and must assume the facts alleged are true. Betancourt v. Storke Hous. Investors, 31 Cal.4th 1157, 1162-63, 82 P.3d 286, 287-88 (2003).

II. Appellants State a Valid Cause of Action to Enforce an Implied Contract.

A. Public Employers May Be Bound by Implied Contracts.

As noted, the court below found that the Amended Petition did not allege facts sufficient to find an express contract obligating the Regents to provide the Retirees with UC-sponsored retiree health. It held that that Appellants could not make out an implied contract claim as a matter of law, stating that "no California authority recogniz[es] an implied contract for a vested right to a certain type of retirement medical benefit in perpetuity." J.A. 545 [Order Sustaining Demurrer, p. 6].

The lower court's view of implied contracts in public employment has since been overruled by the recent decision of the California Supreme Court in *Retired Employees Ass'n of Orange County v. County of Orange*, 52 Cal.4th 1171 (2011) ("*Orange County*"). The question certified there was "whether California law prohibits a county

and its employees from agreeing, by means of an implied contract, to confer vested rights to health benefits on retired county employees." 52 Cal.4th at 783. The Court held there is no such prohibition.

Contracts in California can be "either express or implied." 52 Cal.4th at 783; Civ. Code, § 1619. "The terms of an express contract are stated in words," *id*., Civ. Code, § 1620, while the "existence and terms of an implied contract are manifested by conduct." *Id*.; Civ. Code, § 1621. This distinction "reflects no difference in legal effect but merely in the mode of manifesting assent." *Id*.; Witkin, *Summary of Cal. Law*, 10th ed., 2005, Contracts, § 102, p. 144. Thus, "a contract implied in fact 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." *Id*.; *Silva v. Providence Hospital of Oakland*, 14 Cal.2d 762, 773 (1939). Implied contract terms "ordinarily stand on equal footing with express terms." *Id*.; *Foley*, at 677-678. Even as to *written* contracts, "[e]vidence derived from experience and practice can now trigger the incorporation of additional, implied terms." *Scott v. Pacific Gas & Elec. Co.,* 11 Cal. 4th 454, 463 (1995), *quoting Foley* v. *Interactive Data Corp.,* 47 Cal. 3d 654, 677 (1988).

"All contracts, whether public or private, are interpreted by the same rules unless otherwise provided by the Civil Code," *id*.; Civ. Code, § 1635; *M.F. Kemper Const. Co. v. City of L.A.*, 37 Cal.2d 696, 704 (1951). "Governmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements." *Id*.; *Youngman,* 70 Cal.2d at 246.

In *Orange County,* the county argued that state law *prohibited* implied contracts in

public employment; it also argued that even if implied contracts were admitted, *vested* rights could not arise by implication and, even if they could, this would not extend to a vested right to *retiree health benefits*. 52 Cal.4th at 1179. Our Supreme Court rejected *all* of these arguments, and held governmental bodies can be bound by an implied contract—so long as it does not conflict with a statute. 52 Cal. 4th at 1176, *quoting Youngman*, 70 Cal.2d at 246.

> In response to the Ninth Circuit's inquiry, we conclude that, under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution.

52 Cal.4th at 1194.[9]

The Court emphasized that "a clear manifestation of intent to contract does *not* require explicit statutory acknowledgment." *Orange County,* 52 Cal.4th at 1186 (quoting *California Teachers Assn. v. Cory*, 155 Cal.App.3d 494, 509 (1984)). Rather, "[i]n California law, a legislative intent to grant contractual rights can be *implied* from a statute if it contains an unambiguous element of exchange of consideration by a private party for consideration offered by the state." 52 Cal.4th at 505.

Numerous cases "have *implied* contractual obligations from the particular texts and contexts of the statutes at issue." *Id.; Bd. of Adm. v. Wilson*, 52 Cal. App.4th 1109, 1135 (1997) (implied vested right to actuarially sound public retirement system).

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[9] The Court commented that the county had misread *Markman v. County of Los Angeles,* 35 Cal.App.3d 132 (1973), *Assoc. for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 154 Cal.App.4th 1536 (2007), and *Seymour v. Christiansen,* 235 Cal.App.3d 1168, 1177 (1991), when it argued that public employees are entitled "only to such compensation as is expressly provided by statute or ordinance regardless of the extent of services actually rendered." 52 Cal.4th at 785.

"Although the intent to make a contract must be clear, case law does not inexorably require that the intent be express." 52 Cal.4th at 790. Thus, "[a] contractual right can be implied from legislation in appropriate circumstances." *Id*. (*citing California Teachers Assn. v. Cory*, 155 Cal.App.3d 494, 505 (1984)).

B. Public Employers Can Be Bound by Implied Contracts that Confer Vested Rights.

Orange County held that public employees may acquire rights under an implied contract so long as there is "no statutory prohibition." 52 Cal.4th at 1183. The Court also stressed that there is no practical legal distinction between express and implied contracts. *Id.* at 1185-86 (relying on *Nat'l R. Passenger Corp. v. AT & SFR Co.,* 470 U.S. 451, 466 (1985)). "Vesting remains a matter of the parties' intent," 52 Cal.4th at 1189, and implied contract terms "stand on equal footing with express terms," *Silva v. Providence Hospital of Oakland*, 14 Cal.2d 762, 773 (1939); *Foley* v. *Interactive Data Corp.,* 47 Cal.3d 654, 677-78 (1988).

Orange County holds that vested rights can arise under an implied contract. Addressing *Sappington* v. *Orange County Unified School District,* 119 Cal.App.4th 949, 951 (2004), a case cited by the Regents, *Orange County* stressed the need for a *factual* inquiry into the retirees' "reasonable expectation" of lifetime PPO coverage. *Orange County* emphasized that *Sappington* "did *not* hold that vested benefits could never be implied in the public employee context. Indeed, its analytical approach belies any such interpretation." *Orange County,* 52 Cal.4th at 1190. In fact, *Sappington* regarded the claim of public employees to vested benefits under an implied contract as legally

cognizable; it simply found that their claim was unsupported by the facts. J.A. 393 [Opposition to Demurrer, p.9].

Below, the Regents relied on *San Bernardino Public Employees Assn. v. City of Fontana,* 67 Cal.App.4th 1215, 79 Cal.Rptr.2d 634 (1998) and *San Diego Police v. San Diego Retirement System,* 568 F.3d 725 (9th Cir.2009). However, neither of these cases considered whether vested rights can be created by implication, nor do they diminish "the underlying theory in *California League of City Employee Associations v. Palos Verdes Library Dist.,* 87 Cal.App.3d 135, 150 Cal.Rptr. 739 (1978), that public employee benefits, in appropriate circumstances, could become vested by implication." *Orange County,* 52 Cal.4th at 1190 (quoting cases).[10] Utilizing a careful case-by-case analysis, *Orange County* rejects the argument trumpeted by the Regents that only express *written policies* can give rise to vested rights. *See* J.A. 207 [Regents' Brief in Support of Demurrer, p.12].

C. Public Employers Can Be Bound by Implied Contracts Conferring Vested Rights to Health Benefits.

Orange County also rejects the Regents' contention that *Markman* and its progeny hold that public employers can *never* be bound by an implied contract if it involves compensation or benefits.[11] 52 Cal.4th at 1181. To the contrary:

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[10] *Palos Verde Library* found an implied vested right to pay and vacation where these were offered as an "inducement to remain employed" and a "form of compensation which had been earned by remaining in employment." 87 Cal.App.3d at 140.

[11] UC often described benefits as part of employee compensation: "Up to date, quality benefit plans make up *a large part of your compensation*" and "are *like your other paycheck.*" 1988 *Benefits* Publication, *supra*.

> These cases are simply instances of the broader principle that the law does not recognize implied contract terms that are at variance with the terms of the contract as expressly agreed or as prescribed by statute…Inasmuch as County does not claim that any statute bars the granting of health benefits to retirees, these cases are inapposite.

Id. (internal citations omitted). Like the retirees in *Orange County*, the Livermore Retirees brought suit to enforce "contractual rights that are implied in resolutions duly approved." *Id.* at 1187. Significantly, the Regents do not contend that there is any law, resolution or agreement that would prohibit them from agreeing to provide vested retiree medical benefits.

III. The Retirees Have Adequately Pleaded Claims for a Breach of an Implied or Express Contract.

In light of *Orange County*, the allegations of the Amended Petition are sufficient to state a claim for an implied or express contract. The Regents authorized medical benefits in 1961, before UC hired Appellants, and provided these benefits throughout their career and well into their retirement.[12]

Orange County made clear that the trial court erred in holding that the Retirees could not make out a viable contract claim absent an express promise of "lifetime retiree medical benefits" and "on the same terms" as other UC retirees. J.A. 541-542 [Order Sustaining Demurrer, p. 2-3]. After *Orange County,* this obligation may be *implied* based on the authorization of these benefits in 1961, J.A. 109 [FAP ¶2]; the uninterrupted

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[12] Moen started in 1963 and retired in 2000. J.A. 111 [FAP ¶ 9]. Requa returned to work fulltime at the Lab in 1965 (after a break in service) and retired in 1999. J.A. 110 [FAP ¶¶ 6-7]. Jay Davis began in 1970 and retired in 2002. J.A. 112 [FAP ¶ 13]. Donna Ventura began in 1974 and retired in 2006. J.A. 113 [FAP ¶ 19].

provision of these benefits for more than 50 years; and from any number of UC publications assuring all UC employees they would receive health benefits during retirement so long as they met the eligibility requirements. To vindicate the Retirees' "reasonable expectations" and the "beneficent purpose" of retiree benefits, Appellants should be allowed move forward on their contract claims.

A. The Court Below Erred in Finding that Appellants Did Not Identify A Resolution Authorizing the Provision of Retiree Medical Benefits.

According to the lower court, Appellants' contract claims fail because they "identified no minutes, formal resolution or standing order issued by Respondent conferring on Petitioners retirement medical benefits of a certain type in perpetuity." J.A. 544 [Order Sustaining Demurrer, p.5]. This ruling ignores the holding in *Orange County*.

Appellants alleged that in the 1960's the Regents, acting "in accordance with policies and procedures used ... in the ordinary course of their business and in the proper exercise of their powers," J.A. 115 [FAP ¶32], adopted a resolution authorizing medical benefits for UC employees and retirees. J.A. 109, 435 [FAP ¶2]. UC acknowledges this: "**There is no dispute that The Regents authorized, and the University sponsored, medical insurance coverage for LLNL retirees until 2007.**" J.A. 443 [Reply in Support of Demurrer, p. 1] (emp. added).

Beyond that, in an October 23, 1961 Resolution, the Regents directed that:

> (1) The President be authorized to execute contracts with following carriers upon completion of negotiations of the detailed specifications of the plans: …

J.A. 435 [Petitioners' Request for Judicial Notice, Exh. G][13] In paragraph (2), the Regents addressed retiree health benefits:

> (2) The President be authorized to approve for continued payroll deductions and health insurance subsidy those existing plans which are willing amend their benefits to provide equal benefits to retired employees.

Id. The resolution calls for "equal benefits" for retirees, and contains no restriction on the duration of benefits or any reservation of rights. J.A. 128 [FAP ¶ 104]. Since issuing the resolution, the Regents have provided medical benefits to UC retirees *without interruption* for more than 50 years. J.A. 115 [FAP ¶ 33].

As noted above, the lower court opined that the Retirees could not survive a demurrer absent an express promise of "retirement medical benefits of a certain type in perpetuity." *Orange County* has put this notion to rest. That case held that public employers can be obligated for vested retiree health benefits under an implied contract. 52 Cal.4th at 1194. Thus, the lower court's ruling that the contract claims must fail without a resolution with an express promise is simply wrong. *Orange County* also refutes Respondents' contention that viable contract claim requires a document that recites "the *actual words* of the alleged contract or promise." *Id.* at 444 (emph. in original).

[13] Official minutes of meetings of a legislative body may be judicially noticed. *Thorning v Hollister School District*,: 11 Cal.App.4th 1598 (1992) Further, courts have taken judicial notice of official UC employee policies *See,* Mendoza v. Regents of Univ. of California, 78 Cal.App.3d 168, 171, 144 Cal.Rptr. 117 (Ct. App. 1978) (taking judicial notice of grievance procedure under UC staff personnel policy).

The lower court's ruling flies in the face of *Bellus v. City of Eureka*, 69 Cal. 2d 336, 444 P.2d 711, 71 Cal. Rept. 135 (1968), a California Supreme Court case that stresses the need to construe retiree plans liberally "to carry out their beneficent policy." *Id*. at 340, 345. The question in *Bellus* whether liability for funding police and firefighter pensions was a general obligation or whether it was limited to plan monies. The plan and pension ordinance were silent on this; however, neither imposed any express limits on how to fund. The Court found for the plan participants, noting that their pension was an "integral part of the employment contract"; a "strong factor" in inducing them to enter and remain in public employment; and that a ruling in their favor was the only way to "protect the reasonable expectations of those whose reliance is induced" and avoid "injustice." *Id.* This expansive view expressed in *Bellus* stands in sharp contrast with that of the lower court; we urge follow the *Bellus* approach here.

B. UC's Representations Support the Existence of an Implied Contract.

The facts alleged in the Petition are sufficient to state a claim for breach of an implied contract.[14] As noted, retirement plans must be liberally construed to further their "beneficent purpose" and protect the "reasonable expectations" of employees. *Bellus*, 69 Cal.2d at 350; *and see O'Dea v. Cook*, 176 Cal. 659, 662 (1917); *United Firefighters of*

[14] In fact, the Regents' authorization, together with repeated written assurances made over many decades, could form the basis of an *express* contract. The terms of an express contract need not be confined to the resolution language and booklets, but can be supplemented with "[e]vidence derived from experience and practice" that could trigger "the incorporation of additional, implied terms." 52 Cal.4th at 1178-79, citing *Scott v. Pacific Gas & Elec. Co.,* 11 Cal.4th 454, 463 (1995); *Foley* v. *Interactive Data Corp.,* 47 Cal.3d 654, 677 (1988).

Los Angeles v. City of Los Angeles, 210 Cal.App.3d 1101, 1102 (1989).

Petitioners alleged that during their employment, the Regents offered to provide "University-sponsored group health plan coverage" when they retired. FAP ¶¶ 38-59, Exhs. 1-9. Petitioners could accept this offer either "by words or conduct." Witkin, *supra,* Contracts, § 188. Here, they accepted by working and continuing to provide services over an extended time. Amended Petition, ¶¶ 102-103. The "continuing services of an employee, whether in public or private employment, are consideration for an employer's promise to pay a pension in the future." Witkin, § 210, citing *Kern v. Long Beach,* 29 Cal. 2d 848, 855 (1947), *Hunter v. Sparling,* 87 Cal.App.2d 711, 723 (1948), and *Chinn v. China Nat. Aviation Corp.,* 138 Cal.App.2d 98, 99-101 (1955) (retirement benefits are "in effect offers of a unilateral contract which offer is accepted if the employee continues in the employment").

A contract to provide Appellants with UC-sponsored health care can be implied from the resolution, the numerous employee handbooks, and the fact that UC continued to provide these benefits for over fifty years. "Although the intent to make a contract must be clear, case law does *not* inexorably require that the intent be express." *Orange County,* 52 Cal.4th at 1187 (emph. added).

California courts have implied contracts from personnel policies and handbooks. In *Hunter v. Sparling*, 87 Cal.App.2d 711 (1948), plaintiff worked twenty years at a bank that had a policy of providing its employees with pensions. The court found an implied contract to provide plaintiff with a pension, even though he had never read the policy (it was in Japanese), since he "knew that such rules existed and knew of their general

import."[15] *Id*. at 722. More recently, in *Kashmiri v. Regents of University of California*, 156 Cal.App.4th 809, 829 (2007), the court found an implied contract not to raise fees based on representations UC made on its website and in catalogues.

The trial court construed excerpts from nine booklets attached as exhibits to the Amended Petition. These contained repeated assurances: "You may continue your University-sponsored group health plan coverage ... when you retire," or words to that effect. J.A. 118-119; 122, 129, 166 [FAP ¶¶ 48, 50, 51. 62, 110, Exh. 6]. According to the lower court,

> …the statements are replete with conditional language, i.e. "You may continue your University-sponsored group health plan coverage...after you retire." "Coverage can be continued as long as...." "If the conditions...are met..."

J.A. 543 [Order Sustaining Demurrer, p. 4]. These handbooks can be read as telling employees that they will receive health care during retirement—so long as they met the specified eligibility criteria. Any long-term employee would find the eligibility standards fairly easy to satisfy. Primarily, the standards required that he be participating in a UC-sponsored health plan at retirement and elect to receive a monthly (not lump sum) pension benefit.[16] The Amended Petition alleges that Appellants met these

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[15] *Hunter* is often cited as an example of an "enforceable promise to pay pension benefits *inferred from personnel policies*." *Guz v Bechtel*, 24 Cal.4th 317, 344 (2000) (emph. added); *and see Scott v. PG&E*, 11 Cal.4th 454, 464 (1995). *See also Foley v. Interactive Data*, 47 Cal.3d 654, 681 (1988) (implied contract not to terminate with good cause); *Scott v. PG&E*, 11 Cal.4th 454, 465 (1995) (implied contract not to demote without good cause); *Chinn v. China Nat. Aviation Corp*., 138 Cal.App.2d 98 (1955) (implied contract to pay severance benefits).

[16] According to 1998 *Handbook*, employees were eligible if they: were enrolled in

specified eligibility provisions. J.A. 120 [FAP ¶ 55].

The lower court read the handbook language as "permissive ... favoring Respondent." The court pointed to the use of the word "may." However, in this context it did not mean that retirees "may" receive benefits if UC chooses to provide them. Rather, the booklets made it clear that retirees "may" receive coverage as long as they are eligible. And meeting eligibility standards turns on each employee's work history and how he decides to receive his pension, not the whims of the Regents.

C. Appellants Adequately Pleaded a *Vested* Right to Benefits.

The Regents' intentions have been apparent since 1961. They decided to offer active and retiree health benefits in order attract desirable employees and induce to them stay long term. As discussed earlier, the 2010 report of *President's Task Force on Post-Employment Benefits* confirms that retiree medical was "critically important for recruiting and retaining outstanding faculty and staff." J.A. 121-122 [FAP ¶¶ 60-61; Exhibit 10, pp. 6, 9].

The court below noted that Appellants cited cases where employees were found to have vested rights to "*pension benefits,*" and that "[n]o cited authority finds retiree health benefits and pension benefits to be synonymous." J.A. 545 [Order Sustaining Demurrer, p. 6]. *Orange County,* however, held that California law allows an employee to establish a vested right to retiree health care under an implied contract (*see* discussion *supra* at 16-

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a UC medical plan at retirement; elected to continue coverage; maintained coverage until benefits commenced; elected to receive a monthly (not lump sum) pension; began receiving pension benefits within 120 days of retirement; and their monthly pension was large enough cover any net deduction. *See, e.g.,* J.A. 172 [FAP Exh. 8, p. 14].

17). Here, Appellants have pointed to ample evidence from which the fact-finder could find an implied contract. This included the Regents' 1961 resolutions, the repeated assurances in UC benefit books issued over an extended period, and UC's actual practice for more than a half century. Taken together, this evidence is sufficient to prove an implied contract under which the Livermore Retirees were entitled to UC-sponsored health care throughout retirement.

While the handbooks support the Retirees' contract claim, there is no UC document that suggests that retiree health will come from a source other than a UC-sponsored plan. Nor does any document even a hint that UC would or could remove the Livermore Retirees from the UC-wide risk pool. To the contrary, UC's benefit books and representations are addressed to all UC employees and make no distinction between groups of employees.

In addition, the benefit books link retiree medical coverage to eligibility for a UC pension.[17] As pension benefits are for life and cannot be altered once they vest, this linkage provides further evidence that retiree medical benefits are not subject to wholesale elimination, as UC now contends.[18]

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[17] *See* discussion at J.A. 394-95 [Opposition to Demurrer, p.11].

[18] Linking retiree health to pension eligibility has often been cited in ERISA cases in the private sector as evidence of lifetime retiree health benefits. As the Court in *Orange County* noted, "All contracts, whether public or private, are to be interpreted by the same rules unless otherwise provided by the Civil Code. (Civ.Code, § 1635; *see also M.F. Kemper Const. Co. v. City of L.A.* (1951) 37 Cal.2d 696, 704, 235 P.2d 7 ["California cases uniformly refuse to apply special rules of law simply because a governmental body is a party to a contract"].)" *Orange County*, 52 Cal. 4th at 1179 "*Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 656 (6th Cir. 1996) (citing "provisions in

In *Kern v. City of Long Beach*, 178 P.2d 799, 29 Cal.2d 848 (1947), the California Supreme Court recognized that:

> Pension annuities ... are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful services.

Id. at 853 (emph. added) (quoting *Giannettino v. McGoldrick,* 295 N.Y. 208 (1946)); *see also Creighton,* 58 Cal.App.4th at 243 ("A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment.")

Retiree health benefits have also been held to vest upon acceptance of employment. *Thorning v Hollister School District*, 11 Cal.App.4th 1598 (1992)("the elements of compensation [here, retiree health] … become contractually vested upon acceptance of employment." (*citing Betts,* 21 Cal.3d at 863)). *Thorning* further held:

> The principle that an employee begins earning pension rights from the day he starts employment is not limited simply to pension cases but extends to other types of benefits. (*California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 139 [150

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each of the CBAs at issue which tie retiree and surviving spouse eligibility for health insurance coverage to eligibility for vested pension benefits," and finding it reasonable for the district court to have concluded that "Since retirees are eligible to receive pension benefits for life, … the company provide lifetime health benefits as well."); *McCoy v. Meridian*, 390 F.3d 417, 422 (6th Cir. 2004) ("Because the Supplemental Agreement ties eligibility for retirement-health benefits to eligibility for a pension, in other words, there is little room for debate that the retirees' health benefits vested upon retirement under *Golden…*"); *Yolton v. El Paso Tenn. Pipeline Co.,* 435 F.3d 571, 580 (6th Cir. 2006) (affirming, noting: "Because the pension plan is a lifetime plan and the health insurance benefits are tied to the pension plan, the district court found that the health insurance benefits were vested and intended to be lifetime benefits.")

> Cal.Rptr. 739], hereafter *California League.*) In *California League,* the court determined that the three benefits in question, a longevity salary increase, extra vacation after ten years of continuous service, and a paid sabbatical after each six years of full-time service, were fundamental benefits (87 Cal.App.3d at p. 139) and "maturing emoluments for continued service" (*id.* at p. 138).

11 Cal.App.4th at 1607. The court viewed retiree health as a "fundamental" right, and "an inducement to remain employed and a form of compensation which had been earned by remaining in employment." *Id.(*citing *Cal League,* 87 Cal.App.3d at 140) (emp. added).

Indeed, UC itself has long touted retirement benefits as an important part of employee compensation. The 1988 handbook entitled *Benefits*, in "Your Benefits - The Other Part of Your Compensation," begins: "Up to date, quality benefit plans make up *a large part of your compensation*" and "are *like your other paycheck.*" J.A. 118 [FAP, ¶ 46, Exh. 6, p.1; (emp. added).

Here, the Regents consciously offered attractive retiree medical benefits to "induce" continued, faithful service. As noted, retiree health was "critically important for recruiting and retaining." J.A. 121-122 [FAP ¶¶ 60-61; Exhibit 10, pp. 6, 9]. UC offered these benefits to recruit and retain the employees it wanted. In fact, the plan worked. Appellants came to UC and remained at Lab for decades until retirement in large part because of the promised retirement benefits. J.A. 110-113; 121-122 [FAP ¶¶ 6-7, 9, 13, 19, 58-59, 63].

D. The Benefits that Livermore Retirees Seek are Similar to Those Sought by Retirees in *Orange County*.

Orange County is similar to this case in this respect. The Livermore Retirees are not seeking any particular benefit level. Rather, they seek to restore the *status quo ante*, return to the UC-wide risk pool, and resume receiving the same benefits as other UC retirees. Likewise, the *Orange County* retirees did not ask for any particular health coverage. They too sought to restore the *status quo ante* and return to the unified risk pool and have their premiums calculated using the method that had long been used.

In *Orange County,* the pension ordinance and plan did not address the duration of risk pool. The retirees argued that the "long-standing and consistent practice" of pooling coupled with representations made by the county about maintaining it, created an implied contract giving them a right to remain in the risk pool with active employees. 52 Cal. 4th at 1177. They pointed to a benefit booklet entitled "Health Plan Choices," which provided that "[w]hen you retire from the County you will be eligible to continue with the health insurance plans" and that "[r]etiree rates are based on the full monthly premiums." *Id.* at 1178.

The *Orange County* court stated that whether the retirees had a contractual right to remain in the unified pool "does not necessarily depend on whether there is express language in a statute or ordinance" granting this benefit "during their lifetimes." *Id.* at 1183. Rather, this right could be implied from practice and representations. The court also noted that since the retirees were "seeking to preserve a particular methodology" of calculating their premiums rather than any particular contribution level, they did not

require explicit legislative approval in any event. *Id.* at 1193.

E. There are No Reservations that Diminish the Vested Rights of Livermore Retirees.

None of the so-called reservation of rights provisions cited by the Regents can diminish the implied promise to provide the Retirees with UC-sponsored group health during retirement. One such provision from the 1998 *Handbook* reads:

> Health and welfare benefits are not accrued or vested benefit entitlements. UC's contribution toward the monthly cost of the coverage is determined by UC and may change or stop altogether, subject to the state of California's annual budget appropriation.

J.A. 119-120 [FAP ¶ 54, Exh. 8, p. 14].

The 1998 Handbook appears to be the earliest document in which UC asserted a right to alter benefits in any way.[19] J.A. 129 [FAP at ¶ 112]. By 1998, however, Appellants had been working at the Lab for decades (Appellant Requa, for example, had been working there for 37 years) and were approaching retirement. As discussed *supra,* their rights to retiree health vested decades earlier, when they began work. *See Thorning, supra,* 11 Cal.App.4th 1598 ("the elements of compensation [here, retiree health] … become contractually vested upon acceptance of employment." (citing *Betts v. Board of Administration supra,* 21 Cal.3d at 863)).

Plainly, once these rights vested, UC could not divest them by declaration. The crux of the deal was that Appellants would receive retiree healthcare in exchange for

[19] Below, the Regents argued that the 1988 Handbook contained language that showed that the Retirees did not have a contractual right to these benefits. We discuss why this is not so in detail earlier in footnote 5.

long-term service until retirement. It was too late in the game to change the terms now, after Appellants had already provided UC with twenty or thirty years of work.

Further, the above quoted provision that UC inserted in the 1998 handbook did not permit it to terminate UC-sponsored coverage to the Livermore Retirees. The language only refers "UC's contribution toward the monthly cost of the coverage," which "is determined by UC and may change or stop altogether, subject to the state of California's annual budget appropriation." J.A. 119-120 [FAP ¶ 54, Exh. 8, p. 14]. At most, UC has asserted that it has a right to determine the amount of its contribution or whether to stop contributing altogether. And even these decisions are "subject" to the state budget. But nowhere has UC asserted a right to *terminate* coverage under UC-sponsored plans—precisely the conduct that the Livermore Retirees challenge here.

IV. Retirees Have Adequately Pleaded Promissory and Equitable Estoppel.

Appellants pleaded two estoppel counts, one alleging promissory estoppel and the other alleging equitable estoppel. While both counts assert estoppel, they rest on different bases. *Promissory* estoppel is based on a *promise, w*hile *equitable* estoppel is based on misrepresentation of fact. *Panno v. Russo*, 82 Cal. App. 2d 408, 412 (1947).

"Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.'" *Kajima/Ray Wilson v. Los Angeles County Metro. Trans. Auth.*, 23 Cal.4th 305, 310 (2000) (quoting *Raedeke v. Gibraltar Sav. & Loan Assn.*, 10 Cal.3d 665, 672 (1974)). Equitable estoppel "rests on the theory that the party to be estopped *may not prove certain facts* if he has by his conduct or declarations misled another to his

prejudice." *Youngman*, 70 Cal.2d at 249, fn. 7 (emp. in orig.) (citing *Scott v. Federal Life Ins. Co*., 200 Cal.App.2d 384, 391 (1962); *General Motors Accept. Corp. v. Gilbert*, 196 Cal.App.2d 732, 742 (1961); and Evid. Code, § 623).

A. Livermore Retirees Have Adequately Alleged Promissory Estoppel.

"'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise...'" *Kajima/Ray Wilson*, 23 Cal.4th at 310, quoting Rest.2d Contracts, § 90, subd. (1), p. 242; *C & K Engineering Contractors v. Amber Steel Co*., 23 Cal. 3d 1, 6 (1978) (noting that Rest.2d Contracts § 90 "has been judicially adopted in California").

Promissory estoppel will "make a promise binding ... *without consideration* in the usual sense of something bargained for and given in exchange. If the promisee's performance was requested at the time the promisor made his promise and that performance was *bargained for*, the doctrine is inapplicable." *Youngman,* 70 Cal. 2d at 249 (emp. added). "[W]here the promisee's reliance was bargained for, the law of consideration applies; and it is only where the reliance was unbargained for that there is room for application of the doctrine of promissory estoppel." *Id.* at 250.

"The elements of promissory estoppel are: (1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages 'measured by the extent of the obligation assumed and not performed.'" *Poway Royal Mobilehome Owners Assn. v. City of Poway*, 149 Cal. App. 4th 1460, 1471 (2007) (citing *Toscano v. Greene Music*, 124 Cal.App.4th 685, 692 (2004)). "To be binding, the promise must be clear and unambiguous." *Cotta v. City and*

County of San Francisco, 157 Cal.App.4th 1550, 1566 (2007)(citing *Lange v. TIG Ins. Co*., 68 Cal.App.4th 1179, 1185 (1998)).

"The party claiming estoppel must specifically plead all facts relied on to establish its elements." *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38, 48 (1990). Appellant have done so here, as they have alleged a promise, reliance, substantial detriment, and damages. *Poway Royal,* 149 Cal.App.4th at 1471.

The promise has been discussed in detail earlier. In short, UC promised the Livermore Retirees in benefit books and otherwise that they would receive retiree health—like any other UC employee—in return for long term service and provided they satisfied the eligibility requirements. The Retirees relied on the promise by remaining at the Lab and foregoing other opportunities they would have likely pursued had they known that UC did not intend to honor this promise. J.A. 122 [FAP ¶ 63]. In addition to terminating coverage under UC-sponsored plans, UC also removed them from the UC-wide risk pool. As a consequence, the Retirees are now in a smaller and aging risk pool, which means that their health costs will rise more rapidly than if they remained a part of the UC pool. J.A. 126 [FAP, ¶¶ 93, 94]; *Poway Royal,* 149 Cal. App. 4th at 1471.

The lower court rejected the promissory estoppel count because its application to these facts "would effectively nullify a policy adopted for the benefit of the public." J.A. 547 [Order Sustaining Demurrer, p.8]. The lower recognized that promissory estoppel is appropriate where "the interests of justice clearly require it and where a complaint alleges exceptional peculiar and compelling circumstances," *Id.* However, it did not view termination of the Retirees' UC-sponsored coverage and removal from the UC-wide risk

pool as an "injustice so severe as to warrant the imposition of estoppel against a public entity." *Id.*

To be clear, promissory estoppel will apply "to claims against the government, particularly where the application of the doctrine would further public policies and prevent injustice." *US Ecology v. State of California*, 92 Cal.App.4th 113, 131 (2001) (promissory estoppel applied where state breached promise to "use its best efforts to acquire [a site]" after plaintiff spent millions of dollars to develop a waste disposal facility). *See also*, *Shoban v. Board of Trustees*, 276 Cal.App.2d 534, 544-545 (1969) (school district estopped from recovering salaries paid to teachers who moved to area in reliance on district assurances they would receive more credit for graduate work than policy allowed). Contrary to the lower court's view, no "strong rule of policy adopted for the benefit of the public," would be nullified by the application of promissory estoppel here, and doing so would "prevent injustice," *US Ecology*, 92 Cal.App.4th at 131.

B. Livermore Retirees Have Adequately Alleged Equitable Estoppel.

"Generally speaking, equitable estoppel requires four elements: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) must rely upon the conduct to his injury." *Driscoll, supra,* 67 Cal.2d at 305; *and see City of Long Beach v. Mansell*, 3 Cal.3d 462, 489 (1970); *Tyra v. Board of Police etc. Com'rs*., 32 Cal.2d 666, 670-671 (1948).

The Regents argued below that equitable estoppel required an intentional and deliberate attempt to deceive, and would not apply here since they told Appellants that retiree health benefits were not vested. However, the Regents never did so until *1998,* when they inserted language into benefit books that "health and welfare benefits are not accrued or vested benefit entitlements." J.A. 178 [FAP, Exh. 8, p. 14]. As discussed above, by 1998 Petitioners had spent 20, 30 or more years at the Lab and were approaching retirement. J.A. 121, 122 [FAP, ¶¶ 59, 63]. The Regents' behavior is particularly egregious as they understood that the promise of retiree health was "critically important for recruiting and retaining outstanding faculty and staff." J.A. 121-122 [FAP ¶¶ 60-6 1, Exh. 10, p. 9].

Courts look to the "nature of the right" to determine the government's obligation; the "greater the right of the claimant, the heavier the obligation upon the agency not to mislead him," *Driscoll,* at 308. And courts are particularly careful to protect retirement benefits. *Longshore v. County of Venture,* 25 Cal. 3d 14, 28-29, 598 P.2d 866 (1979) (citing *Driscoll,* 67 Cal. 2d at 308-309).

1. Regents Were "Apprised of the Facts".

In 1961, the Regents authorized medical benefits for UC employees and retirees. There was no limit on duration nor did they assert any right to amend or terminate these benefits. J.A. 115; 435 [FAP ¶ 32; Exh. G to Petitioners' Request for Judicial Notice, Board Resolution]. As we have shown, the Regents knew this was a powerful recruiting and retention tool. In numerous documents and publications, UC encouraged employees to rely the availability of these benefits in retirement. In short, the Regents knew full

well that the Livermore Retirees and many other UC employees were induced to hire on and remain at UC until retirement based on the promise of a retirement with UC-sponsored health care.

2. UC Actively Promoted the Benefit and Encouraged Employees to Rely on It.

As discussed, the 2010 report from the *President's Task Force on Post-Employment Benefits* recognizes the allure of retiree health and how the promise of these benefits provided UC with "a key competitive advantage" and "compensate[ed] for the lack of competitive salaries." J.A. 121-122[FAP ¶¶ 60-61, Exh. 10, pp. 6, 9]. If employees understood that the Regents could deny these benefits or even terminate them after retirement, they would hardly have been a useful recruiting tool. Of course, UC encouraged the opposite view and provided multiple assurances (*see, e.g.*, "You may continue your University-sponsored group health plan coverage" during retirement, J.A. 116 [FAP, ¶¶ 39-40, Exhs. 1 & 2 (1979 booklets)) in order to reap the benefits from inculcating this belief. And the Regents waited until 1998, when Appellants were about to retire before even asserting a right to alter contributions. By that time, Appellants' rights to these benefits had been vested for many years. Further, in 1998, UC only reserved a right to determine the amount of its contribution to retiree health; it did not reserve any right to terminate coverage under UC-sponsored plans, as it has done here.

Plainly, the Regents *intended* that their conduct "shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended." *Driscoll*, 67 Cal.2d at 305. The Taskforce Report confirms this. J.A. 121-122

[*President's Task Force,* FAP, ¶¶ 60-61, Exh. 10, pp. 6, 9]. Under these circumstances, the Livermore Retirees "had a right to believe" that UC intended they would "act on" these representations. 67 Cal.2d at 305. And act they did, as they remained at the Lab "in significant part, because they would receive University-sponsored group health plan coverage when they retired." J.A. 122 [FAP, ¶ 63].

3. The Livermore Retirees Were Ignorant of the True State of Facts.

Appellants had no reason to know that the Regents believed they could terminate UC-sponsored coverage for Livermore Retirees, remove them from the UC-wide risk pool, and herd them into a smaller, aging and considerably less healthy pool. J.A. 126 [FAP, ¶¶ 93, 94].

4. The Livermore Retirees Relied to their Detriment.

Clearly, the Livermore Retirees relied on these representations to their detriment. *Driscoll,* 67 Cal. 2d at 305. They remained at the Lab in reliance on the promise of UC-sponsored health benefits after they retired. J.A. 110-113; 120, 122 [FAP, ¶¶ 6-7, 9, 13, 19, 58-59, 63]. Indeed, after Appellants retired, UC continued to provide them with the medical benefits promised – until 2008. J.A. 110-113; 122, 126 [FAP, ¶¶ 8, 11, 15-17, 21-23, 67, 91-92]. As a result of their reliance, each has suffered damage and all of face a very uncertain future. J.A. 110-113; 126, 132 [FAP, ¶¶ 8, 11, 16, 21, 93, 94].

Appellants' predicament is not unlike a man who finds his wallet on the floor but, unbeknownst to him, it is now a string—here, a string held by the Regents. Throughout the decades the Retirees worked at Livermore, the Regents encouraged them to believe that, by staying, they guaranteed themselves a secure retirement. When

Appellants reached for their wallets in 2008, however, the Regents yanked it away. The result has been painful and caused them much distress.

5. Regents Should Be Estopped from Denying UC-Sponsored Benefits.

The Amended Petition adequately alleges each element needed for equitable estoppel. Estoppel "is now applied freely against the state, its subdivisions, and other governmental agencies," if it does not "defeat the operation of a policy protecting the public." Witkin, *Summary of Cal. Law* (9th ed. 1990) Equity § 185, 867; *see Driscoll*, 67 Cal.2d 297, 305-306.

Courts are careful to protect the reasonable expectations of public employees in estoppel cases involving retirement benefits: "We have recognized and applied against public entities a doctrine of equitable estoppel," often in the "the narrow area of public employee pensions," which have a "unique importance ... to an employee's well-being," and which often arise "after employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations by their employers." 25 Cal.3d at 28-29, citing *City of Long Beach v. Mansell*, 3 Cal.3d 462, 489 (1970) (reaffirming *Driscoll,* 67 Cal.2d 297); *Baillargeon v. Dept. of Water & Power*, 69 Cal.App.3d 670, 679-681 (1977); and *Crumpler v. Bd. of Admin.*, 32 Cal.App.3d 567, 584-585 (1973).

The lower court rejected the claim of equitable estoppel primarily because it believe that UC adequately alerted Appellants that their benefits might not be there. For this reason, the court found that Appellants could not claim that the Regents misled them. J.A. 547 [Order Sustaining Demurrer, p.8, citing *City of Goleta v. Sup. Ct*., 40 Cal.4th

270, 279 (2006)] However, as we have explained, the language that UC began inserting it its benefit books in 1998 was too little and definitely too late.

If we accept the lower court's view, the Regents were free to wait *until after Appellants remained at Livermore for decades* before UC had to alert them that retiree health could be changed or even eliminated. J.A. 122 [FAP ¶ 62]. The lower court perceived no injustice in Appellant Requa putting in 33 years of work before 1998.

The lower court decision on this count amounts to a wholesale rejection of the concept of *equitable* estoppel. "When required by considerations of common justice, *especially to its own employees*, a municipality may be estopped." *Phillis v. City of Santa Barbara*, 229 Cal.App.2d 45, 57 (1964) (emp. added) (citing *United States Fid. & Guar. Co. v. State Board of Equalization*, 47 Cal.2d 384, 388 (1956)). In a publication describing retiree medical benefits, UC told Appellants that "quality benefit plans make up *a large part of your compensation*" and "are *like your other paycheck.*" J.A. 118 [FAP, ¶ 46, Exh. 6, p.1; (emp. added)]. The Regents should be bound by their representations.

CONCLUSION

In the seminal case of *Kern v. Long Beach,* 29 Cal.2d 848, 179 P.2d 799 (1947), the California Supreme Court addressed a situation not unlike the one Livermore Retirees now face. The public employee in that case worked for the city for 20 years, at which point he was supposed to be eligible for a pension. However, thirty-two days before he was to have been eligible, the city amended the charter, effectively depriving him of his pension. In directing that the he receive his pension, the Court observed:

> It is obvious that this purpose [to induce competent persons to enter and remain in public employment] would be thwarted if a public employee could be deprived of pension benefits, and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary.

Id. at 856 (citations omitted; emp. added). UC's promise of retiree health benefits to the Livermore Retirees was definitely an "effective inducement" that got them to remain at Livermore for their entire careers. We ask this Court to ensure that the Regents are not permitted to make the promise of retiree health benefits here into a "snare" or a "delusion to the unwary."

For the reasons set forth above, Appellants respectfully request that the Court deny the Regents' demurrer and allow them to proceed with their case.

DATED: February 26, 2012

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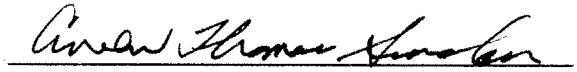

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1)

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